

David Bolton, P.C.
David Bolton, Esq. (DB 3826)
666 Old Country Road, Suite 509
Garden City, New York 11530
Phone: (516) 222-0600
Facsimile: (516) 222-1110
E-mail: dbolton@dboltonpc.com

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
K&S NORTH TITUSVILLE, LLC,

Plaintiff,

-against-

COMPLAINT

JAMES NOTEWARE,

Defendant.

-----X

Plaintiff, K&S North Titusville, LLC, by and through its attorneys, David Bolton, P.C.,
complains of the defendant as follows:

PARTIES

1. Plaintiff is a New York Registered Limited Company which maintains its principal office at 7001 Brush Hollow Road, Westbury, New York.
2. Defendant is a resident of the State of Texas.
3. No members of the plaintiff reside in Texas.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 as there

09 Civ. 9667 (DAB)(MHP)
ECF case

is diversity of citizenship between the parties and the amount in controversy exceeds \$75,000, exclusive of interest.

5. Venue in this District is proper pursuant to 28 U.S.C. § 1391(a).

6. Further, pursuant to a written guaranty (discussed below) the parties irrevocably consented and submitted to the exclusive jurisdiction and venue of “New York Supreme Court, New York County, and the United States District Court, Southern District of New York” and waived all objections to such jurisdiction and venue.

PLAINTIFF’S CLAIM FOR RELIEF

7. Pursuant to a written “Financial Support Agreement,” and related documents, including a “Credit Advance Agreement,” the plaintiff agreed to obtain a letter of credit in favor of Compass Bank (the “Letter of Credit”) for the benefit of non-party Noteware Mesa Verdi Investment, LLC (“NMVI”).

8. In consideration for plaintiff’s agreement to obtain the Letter of Credit, NMVI agreed, in the document titled “Credit Advance Agreement,” among other things, to pay the plaintiff: (a) any amount drawn under the Letter Of Credit; (b) an availability fee equal to \$15,000 per month (the “Availability Fee”); (c) \$11,000 annually to cover the cost of the financial institution issuing the Letter of Credit (the “Annual Fee”); and (d) the legal costs plaintiff incurred in connection with the preparation of the Financial Support Agreement and related documents.

9. In consideration for, among other things, the plaintiff’s agreement to obtain the Letter of Credit, defendant, the owner of NMVI, executed a written guaranty (the “Guaranty”) pursuant to which the defendant “irrevocably and unconditionally, guarantee[d] to [plaintiff] the

prompt payment when due, whether at stated maturity, by acceleration or otherwise, of all obligations and liabilities of [NMVI]" under the Credit Advance Agreement.

10. Plaintiff obtained the Letter of Credit which was issued in favor of Compass Bank in the sum of \$1,100,000.

11. On or about December 23, 2008, Compass Bank drew down the Letter of Credit in the sum of \$1,100,000.

12. Pursuant to the Credit Advance Agreement and the Guaranty, defendant is obligated to pay to the plaintiff the sum of \$1,100,000 which was drawn by Compass Bank.

13. Defendant has failed and refused to pay the plaintiff the sum of \$1,100,000 which is due and owing.

13. In addition, defendant has failed to make other payments due pursuant to the Credit Advance Agreement and the Guaranty, including the Availability Fee and the Annual Fee, in an amount which exceeds \$365,000.

14. Pursuant to the Credit Advance Agreement, upon the occurrence of an Event of Default "the unpaid balance of the Obligations from time to time outstanding shall bear interest at the per annum rate (the "Default Rate") equal to the lesser of (i) eighteen percent (18%), and (ii) the maximum rate permitted by applicable law."

15. In addition, both the Credit Advance Agreement and the Guaranty contain provisions which require the defendant to pay to the plaintiff the costs and attorney's fees the plaintiff has incurred, and will incur, in collecting the amounts due from the defendant.

16. On June 4, 2009 a written demand was issued to the defendant for payment of the amounts due to the plaintiff.

17. The defendant has failed and refused to pay the plaintiff the amounts due.

WHEREFORE, plaintiff requests the entry of judgment in its favor and against the defendant as follows:

- (a) in the sum of \$1,365,000, plus interest at the rate of 18% from December 31, 2008;
- (b) together with any other amounts found to be due to the plaintiff;
- (c) together with the attorney's fees and costs of collection plaintiff has incurred and will incur in this action; and
- (d) including such other and further relief as the Court deems just and proper.

Dated: Garden City, New York
November 12, 2009

DAVID BOLTON, P.C.

By: 

David Bolton, Esq. (DB 3826)
666 Old Country Road, Suite 509
Garden City, New York 11530
Phone: (516) 222-0600
Facsimile: (516) 222-1110
E-mail: dbolton@dboltonpc.com

Attorney for Plaintiff